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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

THOMAS, et al.,

No. C 08-2397 WDB

Plaintiffs,

v.

TD AMERITRADE, INC.,

Defendant.

ORDER:

(1) PRELIMINARILY APPROVING  
CLASS ACTION SETTLEMENT;  
(2) CONDITIONALLY CERTIFYING  
SETTLEMENT CLASS;  
(3) AUTHORIZING NOTICE OF  
PROPOSED SETTLEMENT OF CLASS  
ACTION; AND  
(4) ESTABLISHING PROCEDURE  
FOR OBTAINING FINAL APPROVAL  
OF THE SETTLEMENT

GREGORY O'DONNELL,

Plaintiff-Intervenor,

v.

TD AMERITRADE, INC.,

Defendant.

/

On March 25, 2009, the Court held a hearing on Plaintiff's unopposed motion for an order (1) preliminarily approving the class action settlement agreement; (2) conditionally certifying the settlement class; (3) approving notice to the class and related documents; and (4) establishing a procedure for obtaining final approval of the settlement. Attorney Scott Cole appeared for Plaintiff; attorneys Julie Taylor and Julie Kole appeared for Defendant. The Court ordered the parties to file supplemental information in support of Plaintiff's motion.

1           By letter dated April 8, 2009, Michael Singer, counsel for named plaintiff Gregory  
 2 O'Donnell in the matter entitled *O'Donnell v. TD Ameritrade, Inc.*, requested that the  
 3 Court not decide for thirty days whether to preliminarily approve the settlement. The  
 4 *O'Donnell* proceeding had been filed on January 18, 2007, in the District Court for the  
 5 Southern District of California. That court had dismissed the action by order dated June  
 6 17, 2008, and had ordered the parties to proceed with arbitration pursuant to the terms of  
 7 an arbitration agreement. *See O'Donnell v. TD Ameritrade, Inc.*, C 07-123 BTM, Order  
 8 Granting in Part and Denying in Part Defendant's Motion to Compel Arbitration and Stay  
 9 Proceedings (S.D. Cal. June 17, 2008). TD Ameritrade is represented by the same  
 10 attorneys in the *O'Donnell* proceeding and the *Thomas* action. Following responsive  
 11 correspondence from counsel for both Plaintiff and Defendant in this action, the Court  
 12 granted leave for Mr. Singer to file a reply letter, which he filed on April 14, 2009.

13           On April 24 and May 4, 2009, the Court held telephonic conferences with Mr.  
 14 Singer, with Plaintiff's counsel in this action (Mr. Cole), and with defense counsel  
 15 regarding Mr. O'Donnell's objection to preliminary approval of the settlement.

16           By letters dated May 7, 2009, defense counsel informed the Court that they had  
 17 reached an agreement in principle with Mr. Singer to settle the claims of the *O'Donnell*  
 18 plaintiffs that would not be covered by the *Thomas* settlement. Docket Nos. 43, 44.

19           On May 11, 2009, the Court held a further telephonic conference with Mr. Singer,  
 20 Mr. Cole, and defense counsel to discuss the proposed additional reach of the class  
 21 settlement. Counsel for the parties and for Mr. O'Donnell agreed that the Court need not  
 22 hold another preliminary approval hearing on the proposed settlement of the *O'Donnell*  
 23 claims, but could proceed on Mr. Thomas's pending motion for preliminary approval.

24           On May 14, 2009, Mr. O'Donnell filed a Joint [unopposed] Motion to Allow  
 25 Plaintiff-Intervenor Gregory O'Donnell to Intervene Under Rule 24 of the Federal Rules  
 26 of Civil Procedure. Docket no. 46. On May 15, 2009, Defendant filed a Notice of  
 27 Anticipated Preliminary Approval of Proposed Adjusted Settlement, attaching the  
 28 settlement agreement entered by Mr. O'Donnell and TD Ameritrade. Docket no. 47. On

1 May 18, 2009, the Court entered an Order Allowing Plaintiff-Intervenor Gregory  
 2 O'Donnell to Intervene [in the *Thomas* case] Under Rule 24 of the Federal Rules of Civil  
 3 Procedure.

4 On May 20, 2009, Plaintiff-Intervenor O'Donnell filed a Motion for Preliminary  
 5 Approval of Class Action Settlement. Defendant filed a Notice of Non-opposition to the  
 6 motion on May 21, 2009.

7 Having considered all the pertinent papers and the arguments of counsel, and good  
 8 cause appearing, the Court ORDERS as follows:

9 **1. Preliminary Approval of Proposed Class Action Settlement**

10 **a. Proposed Settlement of *Thomas* Action**

11 The parties to the *Thomas* action propose settlement of the action under the terms  
 12 set forth in the Settlement Agreement and Stipulation dated February 19, 2009. *See*  
 13 Declaration of Kevin R. Allen, Esq., Exh. A (the “Settlement”). Rule 23(e) of the Federal  
 14 Rules of Civil Procedure provides, “If the proposal would bind class members, the court  
 15 may approve it only after a hearing and on finding that it is fair, reasonable, and  
 16 adequate.” Fed. R. Civ. Proc. 23(e)(2). Having conducted several hearings on the  
 17 proposed settlement in this action and having considered the settlement of the claims  
 18 asserted on behalf of putative class members in the *O'Donnell* proceeding contemplated  
 19 by *O'Donnell* class counsel and counsel for TD Ameritrade, **the Court preliminarily**  
 20 **approves the settlement** as set forth in the Settlement Agreement and Stipulation  
 21 pursuant to Rule 23(e).

22 The parties attended a mediation session with David A. Rotman, Esq., on  
 23 December 9, 2008. Allen Decl. ¶ 11. The parties submitted mediation briefs,  
 24 accompanied by evidence, including Plaintiff's damages analysis, and legal authorities to  
 25 facilitate evaluation of the merits and value of this action. *Id.* The parties agreed to the  
 26 mediator's proposal to settle the matter for \$2.5 million.

27 The *Thomas* Settlement provides that TD Ameritrade will pay \$2,500,000.00  
 28 (referred to as the “Gross Fund Value”) into an escrow account which will be used to

1 compensate the named Plaintiff and class members who file a timely claim, to pay  
 2 Plaintiff's attorneys' fees and costs, and to pay an enhancement to the Representative  
 3 Plaintiff for his service to the class. Defendant is responsible to pay its employer payroll  
 4 tax contributions in addition to the above settlement fund. Those members of the  
 5 Settlement class who file timely claims will be compensated *pro rata* based on the  
 6 number of work weeks worked by the entire class during the class period.

7 Having reviewed the papers explaining the terms of the settlement, along with the  
 8 various data and assumptions that were used to assist the parties in arriving at these terms,  
 9 the Court concludes that the \$2,500,000.00 Gross Fund Value is the product of good faith,  
 10 arm's-length and informed negotiations between the parties, and that it is "fair,  
 11 reasonable, and adequate." Fed. R. Civ. Pro. 23(e)(2). The *Thomas* parties' proposed  
 12 Gross Fund Value of \$2,500,000.00 to the class is granted preliminary approval.

13 **b. Proposed Settlement of *O'Donnell* Proceeding**

14 Plaintiff-Intervenor Gregory O'Donnell filed the proceeding entitled *O'Donnell v.*  
 15 *TD Ameritrade* in the District Court for the Southern District of California as civil action  
 16 number C 07-123 BTM. That action alleged claims for unpaid overtime compensation,  
 17 rest and meal period violations, and unfair competition violations against Defendant TD  
 18 Ameritrade on behalf of a class defined as "All current and former California-based  
 19 Investment Consultants or other similarly designated titles who have worked for  
 20 Defendant TD Ameritrade within the last four (4) years from the filing of this complaint  
 21 up to and including the time of trial for this matter." *O'Donnell* Compl. ¶ 15 (filed  
 22 1/18/07). By order dated June 17, 2008, District Judge Moskowitz dismissed the case and  
 23 ordered the parties to proceed in arbitration before the American Arbitration Association  
 24 ("AAA"), pursuant to the parties' arbitration agreement.

25 Mr. Singer contends that the filing of the *O'Donnell* complaint on January 18,  
 26 tolls the statute of limitations for putative class members in the *Thomas* action,  
 27 which was filed on May 9, 2008, extending the class period by fifteen months. Thus,  
 28 Singer argues, the *Thomas* settlement is not fair, reasonable or adequate because it fails to

1 account for those additional work weeks during the tolled period. Defense counsel  
2 disputes whether the filing of the *O'Donnell* complaint tolls the limitations period for the  
3 *Thomas* action. Defense counsel also argues that under the AAA's rules, only class  
4 members who had signed the agreement to arbitrate before the AAA may be class  
5 members in the *O'Donnell* arbitration, and concludes that the putative class in *O'Donnell*  
6 is not identical to the *Thomas* class, which includes class members who did not sign an  
7 arbitration agreement.

8 Defense counsel represents that TD Ameritrade did not utilize an arbitration  
9 agreement prior to April 10, 2006. It follows that the class represented in the *O'Donnell*  
10 arbitration is limited to Investment Consultants hired on or after April 10, 2006, and  
11 excludes class members hired before that date who did not sign the arbitration agreement.

12 Having reviewed the *O'Donnell* complaint and the class definition proposed there,  
13 the Court determines that the claims alleged in *O'Donnell* are substantially similar to the  
14 claims raised in the *Thomas* action, with the *O'Donnell* putative class period beginning on  
15 January 18, 2003, compared to the *Thomas* class period which begins on May 9, 2004.  
16 Defense counsel reports that if the *Thomas* class period were extended to include the  
17 *O'Donnell* Early Period, 48 class members would be added and the applicable number of  
18 work weeks would be increased by 5,424 work weeks. Docket no. 41.

19 Pursuant to the Settlement Agreement entered by Mr. O'Donnell and TD  
20 Ameritrade, the parties to the *O'Donnell* arbitration have agreed to settle the claims of the  
21 plaintiffs in the *O'Donnell* action whose claims are not otherwise covered by the *Thomas*  
22 settlement, at a rate of \$31.64 per week that was worked between January 18, 2003, and  
23 May 8, 2004, resulting in a total Settlement Fund of \$171,615.00. The rate per work  
24 week reflected in the *O'Donnell* settlement is approximately half of the rate per work  
25 week reflected in the *Thomas* settlement, which the Court finds appropriate in light of the  
26 lower salaries paid during that earlier period and the substantial uncertainty about  
27 whether, under applicable legal principles, the filing of *O'Donnell* would toll the statute  
28 of limitations in *Thomas*. The Court also notes that claims arising from the 5,424 weeks

1 worked from January 18, 2003, to May 8, 2004, could not have been reached in the  
2 arbitration in *O'Donnell*, and it is not at all clear that counsel for the *O'Donnell* class  
3 would have been permitted to reopen the litigation in the Southern District to attempt to  
4 seek relief for the Investment Consultants who had not signed arbitration agreements.  
5 Defense counsel states that the average annual salary for Investment Consultants was  
6 \$38,500 during the January 18, 2003, to May 8, 2004, time period, which is about 12.5%  
7 less than the \$44,000 average annual salary earned during the *Thomas* class period. Mr.  
8 O'Donnell has agreed to dismiss with prejudice the *O'Donnell* arbitration before the  
9 AAA.

10 The Court is satisfied that the settlement of the *O'Donnell* claims for the January  
11 18, 2003, to May 8, 2004, time period at the rate of \$31.64 is fair, reasonable and  
12 adequate to compensate putative class members for weeks worked prior to the *Thomas*  
13 class period.

14

15 **2. Conditional Class Certification**

16 When the Court is presented with a proposed settlement prior to a decision on class  
17 certification, the Court must determine whether there is a *prima facie* showing that the  
18 proposed settlement class satisfies the requirements for class certification under Federal  
19 Rule of Civil Procedure 23. *See Schwarzer, Tashima & Wagstaffe, Cal. Practice Guide: Fed. Civ. Pro. Before Trial* § 10:573 (The Rutter Group 2009). For that showing to be  
20 made, the proposed class must satisfy the Rule 23(a) requirements of: (1) numerosity, (2)  
21 commonality, (3) typicality, and (4) adequacy of representation. The parties also must  
22 satisfy one of the subsections of Rule 23(b).

23 The proposed class action settlement covers class members who worked during  
24 any part of two time periods: the *O'Donnell* Early Period from January 18, 2003, to May  
25 8, 2004, and/or the *Thomas* period from May 9, 2004, to May 22, 2009.

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### a. Numerosity

The Court finds that the settlement class in the *Thomas* action, which consists of all persons who were employed by Defendant as an “Investment Consultant” at any of Defendant’s branch offices within the State of California during any portion of the period May 9, 2004 through the date which the Court grants preliminary approval of the Settlement (i.e., the “Settlement Period”), is estimated to include about 323 current and former TD Ameritrade employees. Furthermore, Defendant estimates that an additional 48 class members worked for TD Ameritrade in California during the *O’Donnell* Early Period. The proposed settlement class of about 371 potential class members satisfies the numerosity requirement of Rule 23(a)(1).

## b. Commonality

The Court further finds that the commonality requirement of Rule 23(a)(2) is met. The claims of all class members, including those in the *O'Donnell* Early Period Class, share core legal and factual questions, including how Defendant compensated its Investment Consultants, what duties typically were performed in what percentages of their work time by persons holding the Investment Consultant position, and whether the class members were properly classified as exempt from overtime pay.

### c. Typicality

The typicality requirement of Rule 23(a)(3) is also met. Typicality is satisfied if the claims of the class representatives are “typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Here, the claims of Representative Plaintiffs Jason Thomas and Gregory O’Donnell are typical of those of the other *Thomas* class members: violation of their alleged right to overtime compensation, compensation for missed meal and rest breaks, and/or reimbursement for business expenses, resulting from the same course of conduct, i.e., treating Investment Consultants as exempt employees. All Class Members also seek the same kind of relief: damages, penalties, interest and attorneys’ fees for unlawful deprivation of overtime compensation, compensation for missed meal and rest

1 breaks, and/or reimbursement for business expenses to which they are entitled under state  
 2 or federal law at any time during the Settlement Period.

3 **d. Adequacy of Representation**

4 For the *Thomas* class, the Court finds that the named Plaintiff, Jason Thomas, and  
 5 his counsel are adequate representatives of the conditional settlement class under Rule  
 6 23(a)(4). In reaching this determination, the Court has considered: (1) whether the  
 7 named Plaintiff and his counsel “have any conflict of interest with other class members;”  
 8 and (2) whether the named Plaintiff and his counsel have prosecuted and will “prosecute  
 9 the action vigorously on behalf of the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,  
 10 1020 (9th Cir. 1998). The Court finds that the named Plaintiff, Jason Thomas, has no  
 11 interest that is adverse or antagonistic to the interests of the settlement class. The Court  
 12 also finds proposed Class Counsel to be competent to undertake this litigation. Class  
 13 Counsel have experience in class actions and complex litigation in the arena of  
 14 employment law. Allen Decl., Ex. B. There is no evidence to suggest that Class Counsel  
 15 provided monetary remuneration to the named Plaintiff as an incentive to file the lawsuit,  
 16 or made any other promises or commitments to Plaintiff that would compromise the vigor  
 17 or integrity of his representation of the interests of the class. Accordingly, the Court is  
 18 satisfied that the named Plaintiff Jason Thomas and Class Counsel are adequate  
 19 representatives for the *Thomas* settlement class under Rule 23(a)(4).

20 For the *O'Donnell* Early Period class, the Court finds that the named Plaintiff-  
 21 Intervenor, Gregory O'Donnell, and his counsel are adequate representatives of the  
 22 conditional class. Following correspondence and several telephonic appearances by Mr.  
 23 O'Donnell's counsel, the Court is satisfied that Mr. O'Donnell and his counsel do not  
 24 have any conflict of interest with other class members, and have prosecuted the action  
 25 vigorously on behalf of the class, particularly in light of the fact that Defendant  
 26 vigorously contested liability in the proceedings before the District Court of the Southern  
 27 District of California, challenged the jurisdiction of the District Court pursuant to an  
 28

1 arbitration agreement, and argued that Mr. O'Donnell was precluded from arbitrating on  
 2 behalf of a class.

3                   **e.       Rule 23(b)**

4                   In addition to the requirements of Rule 23(a), a proposed class action must satisfy  
 5 one of the sections of Rule 23(b). In this case, Plaintiff Thomas and Plaintiff-Intervenor  
 6 O'Donnell seek class certification under Rule 23(b)(3). Parties seeking class certification  
 7 under this provision must show that the “questions of law or fact common to class  
 8 members predominate over any questions affecting only individual members, and that a  
 9 class action is superior to other available methods for fairly and efficiently adjudicating  
 10 the controversy.” Fed. R. Civ. P. 23(b)(3).

11                  Here, both the *Thomas* and *O'Donnell* proposed conditional classes satisfy the  
 12 elements of Rule 23(b)(3). The central inquiry in both the *Thomas* action and the  
 13 *O'Donnell* proceeding is whether the Investment Consultant position was properly  
 14 classified as exempt. This issue is common to all Class Members, and predominates over  
 15 questions affecting individual members, thus providing ““justification for handling the  
 16 dispute on a representative rather than on an individual basis.”” *Hanlon*, 150 F.3d at 1022  
 17 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice*  
 18 & *Procedure* § 1778 (2d ed.1986)).

19                  In assessing whether the superiority requirement of Rule 23(b)(3) is satisfied, the  
 20 Court compares a class action with alternative methods for adjudicating the parties’  
 21 claims and, ““if a comparable evaluation of other procedures reveals no other realistic  
 22 possibilities, [the] superiority portion of Rule 23(b)(3) has been satisfied.””  
 23 *Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir.  
 24 2001) (quoting 7A Wright, Miller & Kane, *supra* § 1779); *see also Valentino v.*  
 25 *Carter-Wallace*, 97 F.3d 1227, 1234-35 (9th Cir. 1996) (“a class action is the superior  
 26 method for managing litigation if no realistic alternative exists.”).

27                  In the *Thomas* action, the estimated number of weeks worked by Class Members in  
 28 the *Thomas* class ranges from 0.43 weeks to 254 weeks. *See* 4/8/09 Kole Decl., Ex. 2.

1 Based on a rough estimate of the settlement award at about \$75.00 per work week, the  
 2 recovery by each individual *Thomas* Class Member would range from \$32.25 to \$19,050.  
 3 For the *O'Donnell* Early Period class, the settlement amount of \$31.64 per work week  
 4 would result in a maximum potential recovery of \$1,961.68 per Early Period class  
 5 member for the 68-week period between January 18, 2003, and May 8, 2004. Awards of  
 6 this size are too small to induce individual class members to litigate their claims in  
 7 separate actions. It follows that a class action is superior because it would "permit the  
 8 plaintiffs to pool claims which would be uneconomical to litigate individually."  
 9 *Culinary/Bartender Trust Fund*, 244 F.3d at 1163 (internal quotation and citation  
 10 omitted). Accordingly, the Court finds that the requirements for certification of a  
 11 conditional settlement class under Rule 23(b)(3) are satisfied for the *Thomas* class and the  
 12 *O'Donnell* Early Period class.

13 Therefore, the Court preliminarily certifies a conditional settlement class in the  
 14 *Thomas* action as follows:

15 All persons who were employed by Defendant as an "Investment  
 16 Consultant" at any of Defendant's branch offices within the State of  
 17 California during the period May 9, 2004 through May 22, 2009. This  
 18 excludes any person holding any other position not expressly included in  
 19 the definition of the Class in the Settlement Agreement and Stipulation and  
 20 those individuals who worked at Waterhouse Investment Centers ("WICs").

21 The Court also preliminarily certifies a conditional class for the intervening *O'Donnell*  
 22 Early Period class as follows:

23 All persons who were employed by Defendant as an "Investment  
 24 Consultant" at any of Defendant's branch offices within the State of  
 25 California during any portion of the period January 18, 2003, through May  
 26 8, 2004. This excludes any person holding any other position not expressly  
 27 included in the definition of the Class in the Settlement Agreement and  
 28 Stipulation and those individuals who worked at Waterhouse Investment  
 Centers ("WICs").

### 26           **3. Authorization of Notice of Proposed Settlement**

27           In a class action settlement, the Court must order that notice be given in a  
 28 reasonable manner to all class members who would be bound by the proposal. Fed. R.

1 Civ. Pro. 23(e)(1). Pursuant to the *Thomas* Settlement Agreement and Stipulation, as  
2 modified by counsel during the May 11, 2009, hearing, and the *O'Donnell* Settlement  
3 Agreement, notice will be provided to Settlement class members in the following manner:  
4 within twenty-one (21) calendar days of service of the Notice of Preliminary Approval  
5 Order, the claims administrator will mail the Notice and Claim Form to all identified class  
6 members via first-class regular U.S. Mail using the most current mailing address TD  
7 Ameritrade has available from its records, as modified by any updated address  
8 information the claims administrator may obtain in the course of administration of the  
9 Settlement. The Claim Form will indicate how many work weeks Defendant's records  
10 indicate that the Settlement class members worked during the Settlement Period. Such  
11 records will be made available to Plaintiffs' attorneys upon request. Defendant agrees to  
12 cooperate with the claims administrator so as to enable it to fulfill its duties. The claims  
13 administrator shall also be authorized to investigate and attempt to obtain current address  
14 verification in such manners that it determines necessary and prudent to the discharge of  
15 its duties.

16 If Notice forms are returned because of an incorrect address, or if the claims  
17 administrator receives information from the United States Postal Service that the address  
18 is no longer the current address for an intended recipient, the claims administrator will  
19 promptly notify Plaintiff's attorneys and Defendant. The claims administrator will  
20 coordinate a good faith and reasonable search for thirty (30) days, in a manner determined  
21 by the claims administrator, for a more current address. The parties will promptly  
22 provide any relevant additional information they have regarding individuals whose forms  
23 were returned. The claims administrator is authorized to direct any party to undertake  
24 specific actions to identify and locate individuals (such as conducting a skip trace) and  
25 may seek interim guidance and enforcement from the Court. If new address information  
26 is obtained, the claims administrator will promptly forward the Notice to the addressee  
27 via first-class regular U.S. Mail indicating on the Notice the date when it was re-mailed.

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1           In the event that the procedures outlined here are followed, it will be conclusively  
2 presumed that the intended recipient received the Notice if the Notice has not been  
3 returned to the claims administrator as undeliverable, and if the claims administrator does  
4 not receive information from the United States Postal Service that the address is no longer  
5 the current address for an intended recipient within thirty days (30) days of the initial  
6 mailing.

7           By July 21, 2009, the Claims Administrator must send a postcard to Settlement  
8 Class members reminding them of the August 11, 2009, deadline to object to the  
9 Settlement, opt out of the Settlement, or submit a Claim Form.

10           The Court finds that the parties' proposed notice plan meets the requirement of  
11 Rule 23(e)(1) and hereby authorizes the notice plan.

12

13           **4. Class Action Fairness Act**

14           Defendant has demonstrated that it has provided notice of the Settlement to federal  
15 and state officials in compliance with the requirements of the Class Action Fairness Act  
16 ("CAFA"), 28 U.S.C. section 1715(b). *See* 4/8/09 Kole Decl. ¶¶ 2-5, Exs. 1 and 2. *See*  
17 *also* 5/21/09 Kole Decl. re Revised CAFA Notice.

18

19           **5. Objection to Settlement or Request for Exclusion**

20           As set forth in detail in the Notice of Proposed Settlement, any Class Member who  
21 objects to the Settlement, or who elects not to participate in the Settlement, must submit  
22 in writing, by no later than August 11, 2009, his or her objection to the Settlement or  
23 request for exclusion pursuant to the procedures set forth in the Class Forms.

24

25           **6. Class Representative and Class Counsel**

26           The Court appoints Plaintiff Jason Thomas as the Class Representative for the  
27 *Thomas* class. Scott Cole & Associates, APC, are appointed Class Counsel for the  
28 *Thomas* class:

1 SCOTT COLE, ESQ.  
2 SCOTT COLE & ASSOCIATES, APC  
3 1970 Broadway, Ninth Floor  
4 Oakland, California 94612  
5 Telephone: 510-891-9800  
6 Facsimile: 510-891-7030  
7 Website: [www.scalaw.com](http://www.scalaw.com)

8  
9 The Court further appoints Plaintiff-Intervenor Gregory O'Donnell as the Class  
10 Representative for the *O'Donnell* Early Period Class. Cohelan Koury & Singer, LLP, are  
11 appointed Class Counsel for the *O'Donnell* Early Period Class:

12 MICHAEL D. SINGER, ESQ.  
13 COHELAN KHOURY & SINGER, LLP  
14 605 C Street, Suite 200  
15 San Diego, CA 92101-5305

16 **7. Class Representative Enhancement**

17 In addition to his share as a Class Member, named Plaintiff Jason Thomas seeks  
18 preliminary approval from the Court to receive from the settlement fund a sum of \$15,000  
19 as non-wage payment for serving as Class representative, and for the risks and work  
20 attendant to that role. Furthermore, counsel for Plaintiff-Intervenor Gregory O'Donnell  
21 has notified the Court of their intention to apply for a class representative enhancement  
22 for Mr. O'Donnell which, if awarded by the Court, would be paid by Defendant in  
23 addition to the *O'Donnell* Settlement Fund of \$171,615.00. The Court will determine the  
24 amount of the Class Representative enhancement at the final approval hearing.

25 **8. Class Counsel Fees and Costs**

26 The Court also will determine the amount to be awarded to Class Counsel for fees  
27 and costs at the final approval hearing.

28 In its motion for preliminary approval of the settlement, *Thomas* Class Counsel  
29 asked the Court to approve preliminarily an award of attorneys' fees and costs in an  
30 amount up to 33.3% of the common settlement fund of \$2,500,000.00, which would result  
31 in an attorneys' fee and costs award of up to \$833,333.33.

1 Fee awards out of common funds must be “reasonable under the circumstances.”  
 2 *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir.1990). When calculating fee awards in  
 3 common fund cases, the court has discretion to choose the percentage-of-the-fund method  
 4 or the lodestar-multiplier method. The choice between the two methods depends on the  
 5 circumstances of the case. In 1989, the Ninth Circuit set 25% as the “benchmark” for  
 6 common fund fee awards. *Paul, Johnson, Alston & Hunt v. Grauity*, 886 F.2d 268, 272  
 7 (9th Cir. 1989).

8 At this preliminary juncture, the Court has not determined whether it will use the  
 9 percentage method or the lodestar method to calculate the Class Counsel fees and costs.  
 10 In either case, the Court finds at this time that, for purposes of informing the *Thomas*  
 11 Class Members of the possible amount to be awarded to *Thomas* Class Counsel at the  
 12 final approval hearing, no more than one-third of the *Thomas* Settlement Fund will be  
 13 awarded as fees. Accordingly, the Court finds that the proposed Notice of Proposed  
 14 Settlement sent to the Class Members adequately notifies class members that “up to one-  
 15 third of the Settlement Award” could be awarded to *Thomas* Class Counsel for their fees  
 16 and costs. *See* 5/19/09 Letter of Julie Kole, enclosing revised Notice of Proposed Class  
 17 Action Settlement at II.2 (Docket no. 49). As part of the final approval hearing, Scott  
 18 Cole & Associates, APC, may file a motion with the Court requesting an award of **up to**  
 19 **\$833,333.33** for their attorneys' fees and costs in connection with their work on this case.

20 Counsel for Representative Plaintiff Gregory O'Donnell has notified the Court of  
 21 their intention to apply for an award of attorneys' fees and costs which, if awarded by the  
 22 Court, would be paid by Defendant **in addition to** the *O'Donnell* Settlement Fund of  
 23 \$171,615.00. The Court finds that the proposed Notice adequately states, “The payment,  
 24 if any, of these attorneys' fees and costs will not affect the amount of the weekly payment  
 25 for this [*O'Donnell* Early Period] time period to Class Members.” *Id.* at II.1.

26 \\\

27 \\\

## 9. Settlement Administrator

Rust Consulting, Inc., 625 Marquette Avenue, Suite 880, Minneapolis, MN 55402, is appointed to act as the Claims Administrator for both the *Thomas* and *O'Donnell* class settlements, pursuant to the terms set forth in the Settlement Agreements. Settlement administration expenses for the *Thomas* settlement will be paid from the Gross Fund Value escrow account. The fees and expenses of the Claims Administrator for the *O'Donnell* settlement will be paid directly by Defendant and will not be paid from the *O'Donnell* Settlement Fund or the *Thomas* settlement fund.

## 10. Class Forms

After reviewing the earlier proposed notice and claim forms, the Court instructed counsel to amend the forms to make them as clear and understandable as possible for the Class Members. As amended, the Court concludes that the Class Forms are sufficient to inform Class Members of the terms of the Settlement, their rights under the Settlement, their right to object to the Settlement and/or to elect not to participate in the Settlement, and the processes for doing so, the consequences of taking no action in response to the notice, and the date and location of the final approval hearing. The Class Forms, as amended by the Court, are approved.

The Class Forms, as amended and approved by the Court, shall be disseminated according to the notice plan described in the Settlement Agreement. Proof of distribution of notice must be filed by no later than fourteen (14) days prior to the final approval hearing.

## **11. Stipulation for the Procedures for Final Approval of the Settlement**

Pursuant to stipulation of counsel for Plaintiff Thomas, Plaintiff-Intervenor O'Donnell and Defendant TD Ameritrade, the Court ORDERS that:

(a) By **June 12, 2009**, the Claims Administrator mail the Notice and Claim Form (“Class Notice Package”):

- (b) By **July 21, 2009**, the Claims Administrator mail a postcard to class members who have not yet responded to the class notice to remind them of the August 11, 2009, deadline to submit a Claim Form, object to the Settlement, or opt out of the settlement;
- (c) By **August 11, 2009**, each class member submit a timely Claim Form; or object to the Settlement by mailing an objection to the Court with copies to counsel for the parties and the Claims Administrator; or opt out of the class by mailing to the Claims Administrator a written request for exclusion from the class and the settlement;
- (d) By **September 3, 2009**, the Claims Administrator provide Plaintiffs' counsel with a complete and accurate list of all class members who timely requested exclusion, and Plaintiffs' counsel file a motion for final approval. The notice period on the parties' motion for final approval is shortened from the thirty-five (35) days required by Local Rule 7-2(a) to **FIFTEEN (15) days**. Oppositions to final approval, if any, must be filed no later than **SEVEN (7) calendar days** prior to the hearing on final approval, and reply briefs must be filed no later than **THREE (3) calendar days** prior to the hearing.

## **12. Final Settlement Approval Hearing**

**The Court will hold the Final Approval Hearing on Friday, September 18, 2009, at 1:30 p.m., in Courtroom 4, United States District Court, 1301 Clay Street, Third Floor, Oakland, California 94618.** The purpose of this hearing will be to determine whether the Settlement should be granted final approval as fair, reasonable, and adequate as to the Class Members. The Court will hear all evidence and argument necessary to evaluate the Settlement, and will consider named Plaintiff Jason Thomas's and Plaintiff-Intervenor Gregory O'Donnell's requests for a Class Representative

1 Enhancement, as well as Class Counsel's request for attorneys' fees and costs. Any Class  
2 Member, assisted by counsel or not, may appear at the hearing and support or oppose the  
3 Settlement, the Class Representative Enhancement, and/or Class Counsel's request for  
4 fees and costs. Should the proposed Settlement be approved, following the final approval  
5 hearing, the Court will enter judgment in accordance with the Settlement that will fix the  
6 rights of all class members who do not opt-out.

7 (a) Any Class Member may appear at the final approval hearing in  
8 person or by his or her own attorney, and may offer evidence or  
9 argument for the purpose of trying to show cause why the Court  
10 should not approve the Settlement, or to support objections to the  
11 proposed Class Representative Enhancement and/or the proposed  
12 payment of Class Counsel fees and costs. **As explained in further**  
13 **detail in the Notice of Pendency of Class Action and Proposed**  
14 **Settlement, for any comments or objections to be considered at**  
15 **the hearing, the Class Member must file comments with the**  
16 **Clerk of Court indicating briefly the nature of the Class**  
17 **Member's comments, support or objection.** By no later than  
18 August 11, 2009, such comments must be mailed to: (1) the Court to  
19 the attention of Magistrate Judge Wayne D. Brazil, United States  
20 District Court, 1301 Clay Street, Oakland, California 94618; (2)  
21 Class Counsel at the address provided in the Notice of Proposed  
22 Settlement; (3) TD Ameritrade's Counsel at the address provided in  
23 the Notice of Proposed Settlement; and (4) the Claims Administrator.  
24 (b) The Court reserves the right to continue the date of the final approval  
25 hearing without mailing individual notices to Class Members. If the  
26 final approval hearing is continued from September 18, 2009, notice  
27 of the new date will be provided on the docket for this case (i) online  
28 through the Public Access to Court Electronic Resources system,

1 known as "PACER," at <http://ecf.cand.uscourts.gov>, and (ii) at the  
2 Office of the Clerk at the United States Federal Courthouse at 1301  
3 Clay Street, Suite 400 S, Oakland, California 94612-5212 (open  
4 between 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding  
5 Court holidays). Class Members also may find out whether the final  
6 approval hearing has been continued by calling Class Counsel —  
7 Scott Edward Cole, Esq./Matthew R. Bainer, Esq. (510-891-9800) or  
8 Michael Singer, Esq. (619-595-3001).

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10 **IT IS SO ORDERED.**

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12 Dated: May 22, 2009

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WAYNE D. BRAZIL  
United States Magistrate Judge

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